

New Jersey Poised to Finally Enact Legislation to Protect Trade Secrets

With the New Jersey State Assembly's unanimous approval this month of the Trade Secrets Act (A-921, or "the Act"), New Jersey is poised to significantly enhance protection for trade secret owners. Gov. Chris Christie is expected to sign the bill into law (the state Senate passed the measure unanimously in September), finally bringing New Jersey in line with 46 other states in enacting legislation that protects businesses and individuals from the misappropriation of their trade secrets.

The legislation marks a tremendous victory for trade secret protection in this state. It also provides an opportunity for companies to take stock of their proprietary information and to make certain they have policies and procedures in place to protect it.

As elsewhere, business innovation in New Jersey turns largely on the development of proprietary information to gain a competitive advantage. Historically, trade secret protection in New Jersey has been based on case-by-case decisions under common law. The Trade Secrets Act provides trade secret owners with several new and imposing statutory arrows to add to their quivers – it codifies much of the common law jurisprudence, removes uncertainty, clarifies areas that were subject to wide discretion, and creates uniform requirements and expectations for protecting trade secrets.

Under the common law, there is no one definition of the term "trade secret." The Act clearly defines "trade secret" as "information...including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." The New Jersey version differs slightly from the Uniform Trade Secret Act ("UTSA"), a national model adopted by many states, in defining trade secrets more broadly and expressly allowing acquisition of a trade secret through reverse engineering, independent invention and other means.

It also provides a statutory definition of "misappropriation" – the acquisition, disclosure or use of another's trade secret through "improper means" by someone who knew or had reason to know that the information was a trade secret and was obtained improperly.

Additionally, the Act provides mechanisms for the protection of the trade secret during the course of litigation. Where a misappropriation has occurred, injunctive relief is generally available to prohibit future use of the trade secret by the misappropriating party. However, future use is not always completely prohibited: the Act provides that where a misappropriator has acquired the trade secret and made a material and prejudicial change of position – prior to acquiring knowledge that the trade secret was misappropriated – then courts may permit continued use of the trade secret, conditioned on payment of a "reasonable royalty."

It is worth noting that, in what the legislature deems "appropriate circumstances," courts may also compel affirmative acts to protect a trade secret – although the law does not provide any guidance as to what those appropriate circumstances may be.

Other penalties under the legislation include compensatory damages, punitive damages, and attorneys' fees and costs. For example, those who improperly acquire or disclose a trade secret can now be sued for damages of the actual loss and any resulting unjust enrichment. Willful and malicious misappropriations can result in punitive damages up to twice the amount of actual damages, as well as legal fees and expert witness costs. Conversely, a party that brings a bad faith trade secret misappropriation claim can be stuck with the other side's legal fees and expert costs.

The New Jersey version adopts the UTSA's three-year statute of limitations, down from the current six years.

Because protecting proprietary information is important to maintaining a competitive advantage in the marketplace, companies operating in New Jersey should have in place comprehensive policies and procedures to maintain the secrecy of proprietary information. However, simply designing a plan is not enough – policies and procedures should be regularly reviewed with employees, and companies should periodically conduct compliance audits to monitor use and disclosure of trade secrets. The shortened statute of limitations in the Trade Secrets Act means that employers have even more reason to be on the lookout for actual or potential misappropriation. In short, the Trade Secrets Act is an opportunity for companies to reevaluate measures that are already in place and to plan for the future, to maintain competitive advantage and defend against unwanted disclosure and use of their valuable proprietary information.

If you have any questions regarding the impact of New Jersey Trade Secrets Act, please contact Thomas A. Muccifori, Chair of Archer & Greiner's Employment Competition & Information Protection Group, at (856) 354-3056 or tmuccifori@archerlaw.com, or Julie A. Robinson of the firm's Intellectual Property Practice Group at (856) 616-2683 or jrobinson@archerlaw.com.

DISCLAIMER: This client advisory is for general information purposes only. It does not constitute legal advice, and may not be used and relied upon as a substitute for legal advice regarding a specific legal issue or problem. Advice should be obtained from a qualified attorney licensed to practice in the jurisdiction where that advice is sought.